the antitrust laws and defer to the Justice Department and/or the Federal Trade Commission for their enforcement.[306]

Accordingly, if analyzed under the intermediate scrutiny standard, the Commission's newspaper/broadcast rule could not be upheld. The rule fails the first part of the O'Brien test because a diversity or competition problem in local mass media -- the existence of which is a prerequisite to the finding of a substantial governmental interest -- has not been and cannot be demonstrated. In addition, even assuming that the Court were to find a substantial governmental interest to exist, the rule fails the second part of the O'Brien test because it sweeps far more broadly than necessary, especially given the technological advances and growth in the media marketplace since the rule's adoption in 1975.[307] Thus, there is no basis

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[306] In fact, applying the intermediate scrutiny test, the Supreme Court routinely strikes down regulations that impinge on protected speech interests as insufficiently narrowly tailored, despite strong countervailing governmental interests. See 44 Liquormart, 517 U.S. at 493 (1996) (ban on advertising alcoholic beverages invalidated because less restrictive means existed); Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995) (federal law prohibiting beer labels from displaying alcohol content struck down because alternatives were available that "could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights"); see also Turner II, 117 S. Ct. at 1216 (O'Connor, J., dissenting) ("[T]he availability of less intrusive approaches to a problem serves as a benchmark for assessing the reasonableness of the fit between [the] articulated goals and the means chosen to pursue them.") (citation omitted).

[307] As the Supreme Court made clear in Turner I,

> "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."

Turner I, 512 U.S. at 664 (quoting Quincy Cable TV Inc. v. FCC, 768 F.2d 1434, 1455 (D.C. Cir. 1985)). See Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986) ("Where a law is subject to a colorable First Amendment challenge, the rule of rationality

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for the Commission to continue to maintain an absolute ban precluding newspaper publishers from owning any same-market broadcast stations.

### B. The Scarcity Rationale, Abandoned a Decade Ago by the Commission Itself, Cannot Justify a More Relaxed Standard of Judicial Review or Sustain the Newspaper/Broadcast Cross-Ownership Ban.

In the past, broadcast regulations, including the newspaper/broadcast cross-ownership rule, have been subject to a lesser degree of constitutional scrutiny based on the notion that the scarcity of broadcast frequencies allowed a larger role for government regulation.[308] This "scheme for broadcast regulation developed and was ensconced in an era when broadcasting . . . was the only form of electronic mass media."[309] As documented above, however, the mass

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(...Continued)
which will sustain legislation against other constitutional challenges typically does not have the same controlling force. This Court 'may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity.'") (quoting Members of City Counsel v. Taxpayers for Vincent, 466 U.S. 789, 803 n.22 (1984); Century Communications Corp. v. FCC, 835 F.2d 292, 304 (D.C. Cir. 1987) ("When trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least some reasoning on behalf of its measures."). Indeed, without some demonstrable government interest, there would not appear to be even a rational basis for upholding the newspaper/broadcast cross-ownership rule. See HBO, 567 F.2d at 14 (quoting City of Chicago v. FPC, 458 F.2d 731, 742 (1971)) ("[A] 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.").

[308] See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388-89 (1969). Of course, the cross-ownership ban at issue here affects newspaper publishers as well as broadcasters, and in fact singles out publishers for treatment different than that of other would-be licensees. See infra sec. IX. C.

[309] Laurence H. Winer, Deficiencies of the "Aspen Matrix" at 5 (1998), Paper No. 3 in The Media Institute's series Issues in Broadcasting and the Public Interest. At the time the Commission's Ownership regulations were adopted, "the economic and physical distinctions between print and the broadcast media that underlie the Commission's diversification policies
(Continued...)

media marketplace has changed drastically since that bygone era.[310] The fifty-five year old spectrum scarcity rationale that underlies the Red Lion doctrine and the NCCB decision, therefore, can no longer be invoked mechanically to justify a lower level of judicial scrutiny for broadcast ownership regulations than for regulations affecting other forms of media, nor can it be used as an affirmative justification for governmental action to foster diversity.[311]

In fact, more than a decade ago, the Supreme Court noted that the scarcity rationale "has come under increasing criticism in recent years" and suggested that the advent of new technologies such as "cable and satellite television" -- and the resulting access of communities

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and rules purportedly were numerous and self evident. The number of broadcast outlets nationwide was far fewer than the number of print media outlets." Jonathan W. Emord, The First Amendment Invalidity of FCC Ownership Regulations, 38 Cath. U. L. Rev. 401, 438 (1989). As NAA has demonstrated, this is no longer the case.

[310] See supra sec. VI; see also Commissioner Michael K. Powell, Remarks before the 42nd Annual MSTV Membership Meeting (Apr. 6, 1998) ("The growing convergence of technology will not allow us to continue to maintain two First Amendment standards, one for broadcasting and one for every other communications medium. . . .[C]onvergence . . . and the exponential increase in capacity . . . is making it impossible to maintain that broadcasting is uniquely undeserving of full First Amendment protection.").

[311] Indeed, several years after the Red Lion decision, the Supreme Court acknowledged the inevitable evolution of First Amendment doctrine in the broadcasting field. See CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973) ("the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence"); see also Commissioner Michael K. Powell, Remarks before The Media Institute (Apr. 22, 1998) ("today's communications environment . . . makes the reasoning of Red Lion seem almost quaint"); Jonathan W. Emord, The First Amendment Invalidity of FCC Ownership Regulations, 38 Cath. U. L. Rev. 401, 437-38 (1989) ("But if . . . a tremendous multiplicity of media outlets and competing voices now exists, then the central underpinning of the Commission's diversification policy, a need to promote maximal competition in the media marketplace to ensure maximal competition in the marketplace of ideas, no longer exists.") (citing Syracuse Peace Council, 2 FCC Rcd at 5051).

to diverse programming -- "may soon render the scarcity doctrine obsolete."[312] The Court declined to reconsider the Red Lion doctrine at the time, however, "without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[313] The FCC, Congress, and the courts have now given such signals, acknowledging the inevitable demise of the scarcity doctrine.

As noted previously, in its 1985 reexamination of the fairness doctrine, "the Commission sought to respond to the Supreme Court's invitation," and found "explosive growth of information sources -- in both traditional broadcasting sources (radio and television) and new substitutes for broadcasting such as cable TV, SMATV, VCRs, and LPTV."[314] The Commission concluded that, "[the scarcity] rationale that supported the [fairness] doctrine in

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[312] FCC v. League of Women Voters, 468 U.S. 364, 376-77 n.11, appeal dismissed, 468 U.S. 1205 (1984); see also News America Publ'g, Inc. v. FCC, 844 F.2d 800, 811 (D.C. Cir. 1988) ("The Supreme Court . . . has recognized that new technology may render the [broadcast scarcity rationale] obsolete – indeed, may have already done so."). Other new technology, such as the advent of a "fiber-optic network . . . that will carry virtually limitless television channels, home shopping and banking, interactive entertainment and video games," further undermines the scarcity rationale. Note, The Message in the Medium: The First Amendment on the Information Superhighway, 107 Harv. L. Rev. 1062, 1067 (1994). "Rather than transmitting information in different forms, such as analog signal and electromagnetic waves, the superhighway will carry all information, from voice to video, in the form of digital bits." Id.; see also Commissioner Michael K. Powell, Remarks before The Media Institute (Apr. 22, 1998)("TV stations now have the potential to produce at least four times the number of channels of programming . . . and compression technology promises to expand this even further."). See also Henry Geller, Turner Broadcasting, The First Amendment, and The New Electronic Delivery Systems, 95 Mich. Tel. Tech. L. Rev. 1, 53 (1995) ("In the digital era, since "bits are bits," eventually it will not be possible to distinguish between broadcasting and other forms of electronic publishing.").

[313] Id. The D.C. Circuit recently asserted that the Court's "suggestion" in League of Women Voters "may impose an implicit obligation on the Commission" to review the spectrum scarcity rationale. Tribune Co. v. FCC, 133 F.3d 61, 68 (D.C. Cir. 1998).

[314] Meredith Corp. v. FCC, 809 F.2d 863, 867 (D.C. Cir. 1987).

years past is no longer sustainable in the vastly transformed, diverse [communications] market that exists today."[315] Reviewing the Commission's action, the Court concluded that, "[i]n essence, the [Commission's] Report found that the 'scarcity rationale,' which has historically justified content regulation of broadcasting, is no longer valid."[316]

The FCC itself gave an even more explicit "signal" later that year, stating:

> [T]he scarcity rationale developed in the Red Lion decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore, in response to the question raised by the Supreme Court in League of Women Voters, we believe that the standard applied in Red Lion should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press.[317]

The media marketplace has continued to expand rapidly in the decade since this decision, and the development of new technology ensures that this trend will continue in the decades to come. Moreover, in the decade since the Commission articulated its abandonment of the spectrum scarcity doctrine, its changed regulatory policies clearly have reflected the new

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[315] Syracuse Peace Council, 2 FCC Rcd at 5053 (1986); see also Notice of Inquiry (separate statement of Commissioner Harold W. Furchtgott-Roth, at 3) (citing 1985 Fairness Report, 102 FCC 2d 142 (1985) and Syracuse Peace Council) ("One of the most fundamental ways in which the broadcast landscape may have changed is that . . . there are significantly more outlets for communications than there once were").

[316] Meredith Corp., 809 F.2d at 867 (internal citations omitted); see also id. at 873 ("The FCC has issued a formal report that eviscerates the rationale for its existing regulations.").

[317] Syracuse Peace Council, 2 FCC Rcd at 5053.

standard.[318] As discussed above, the Commission has significantly altered its approach in the ownership arena, eliminating or substantially relaxing virtually all other ownership limitations on media and routinely permitting common ownership of several outlets in a local market.[319]

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[318] NAA recognizes that two Commissioners, Susan Ness and Gloria Tristani, recently have indicated that they believe that the scarcity rationale remains viable. In voting to reject a petition to eliminate the FCC's political editorial and personal attack rules, Commissioners Ness and Tristani expressed their disagreement with what they characterized as "dicta" in the Syracuse Peace Council decision concerning scarcity, and stated that they believe that Red Lion and League of Women Voters remain the appropriate standard for judicial review of broadcast programming regulation under the First Amendment. See Joint Statement of Comm'r Susan Ness and Comm'r Gloria Tristani Concerning the Political Editorial and Personal Attack Rules, FCC Gen. Docket No. 83-484 at 25-26 (rel. June 22, 1998).

It is noteworthy that the Commission vote on the political editorial and personal attack rules was 2-2, and the opinions expressed by Commissioners Ness and Tristani therefore cannot be viewed as overruling the Syracuse Peace Council determination. Also significant is the degree of emphasis placed by these Commissioners on the allegedly narrow scope and careful tailoring of the rules in question, in stark contrast to the absolute ban on newspaper/broadcast cross-ownership. Further, Commissioners Ness and Tristani did not address in any detail the factual circumstances in 1987 that led the Commission to conclude that the scarcity rationale "is no longer sustainable in the vastly transformed, diverse market," much less the circumstances of the marketplace today. See Syracuse Peace Council, 2 FCC Rcd at 5043. NAA agrees with Commissioners Furchtgott-Roth and Powell, who voted in opposition to Commissioners Ness and Tristani, that in the absence of compelling evidence to the contrary, "if communications outlets generally and broadcast stations alone were sufficiently numerous at the time of Syracuse Peace Council to obviate any need for the fairness doctrine, . . . one can only conclude that those communications sources are at least sufficiently numerous now." Joint Statement of Comm'rs Powell and Furchtgott-Roth, FCC Gen. Docket No. 83-484 at 8.

[319] See supra sec. VII.

Congress similarly has expressed doubts as to the viability of the scarcity rationale.[320] Indeed, the Telecommunications Act of 1996 (the "1996 Act") was undeniably viewed by

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[320] Many distinguished scholars have also challenged the viability of the scarcity rationale. See Glen O. Robinson, The Electronic First Amendment: An Essay for the New Age, Duke L.J. at 5 (Spring 1998) ("By the 1980s . . . the emergence of a broadband media . . . was supplanting traditional, single-channel broadcasting and with it the foundation on which the public interest obligations had been laid. If it ever made sense to predicate regulation on the use of a scarce . . . radio spectrum, it no longer did."); Ronald W. Adelman, The First Amendment and the Metaphor of Free Trade, 38 Ariz. L. Rev. 1125, 1167 (1996) ("Technological innovations have steadily increased the capacity of the spectrum. In addition, the total number of channels available for programming has vastly increased due to greater competition from other video providers, especially cable television.") (quoting Note, The Message in the Medium: The First Amendment on the Information Superhighway, 107 Harv. L. Rev. 1062, 1073 (1994) (footnotes omitted)); Mark D. Director and Michael Botein, Consolidation, Coordination, Competition, and Coherence: In Search of a Forward Looking Communications Policy, 47 Fed. Comm. L.J. 229, 233-34 (1994) ("The courts' historical approach to creating rigid distinctions among the media – e.g. 'scarcity' in broadcasting – is obsolete. Electronic media have become increasingly transparent. A television set might show the same program from any one of several sources: broadcasting, cable, DBS, MMDS, videocassette, videodisc, or compact disc (CD-ROM or CD-I)."); William T. Mayton, The Illegitimacy of the Public Interest Standard at the FCC, 38 Emory L.J. 715, 718 ("[T]he predicate for [the] fiduciary theory, a presumed natural scarcity, if it ever existed at all, certainly no longer exists. Today, the broadcast spectrum, which includes AM, FM, VHF, and UHF bands, is quite broad, and, with the addition of cable technology, vast numbers of stations now are feasible."); Jonathan W. Emord, The First Amendment Invalidity of FCC Ownership Regulations, 38 Cath. U. L. Rev. 401, 445 (1989) (New "means of receiving news and information, that do not depend upon spectrum and offer myriad viewing and listening options not only enhance the competitive media environment, but also virtually eliminate any prospect of the feared 'mind control by media barons' that led the Commission's first regulators to create barriers" to broadcast ownership.); Laurence H. Winer, The Signal Cable Sends -- Part I: Why Can't Cable be More Like Broadcasting?, 46 Md. L. Rev. 212, 238-39 ("[T]he concept of a unique, physical limitation on the availability of broadcast frequencies is questionable . . . from a technological point of view there is no inherent shortage of spectrum capacity -- nor was there any fifty years ago . . . [F]rom its inception, the scarcity rationale for regulation of broadcasting was flawed on factual, legal, and policy grounds as well as in its application."); id., at 254-56 ("[W]hen [cable is] considered together with the alphabet soup of other technologies in the new electronic video marketplace, it is apparent that scarcity is a thing of the past."). For a detailed analysis of the infirmity of the scarcity rationale and the newspaper/broadcast rule, see the Affidavit of J. Gregory Sidak, filed concurrently in the instant proceeding on behalf of the NAA (July 21, 1998).

Congress as a mechanism through which to signal its view that the broadcast industry has been transformed since the Red Lion era. In enacting the 1996 Act, the House Commerce Committee observed that, in light of vast changes in the mass media marketplace, "the scarcity rationale for government regulation no longer applies."[321] Moreover, as detailed above, Congress expressly directed the Commission in the 1996 Act to eliminate or relax many of its outmoded ownership restrictions and to reexamine its remaining ownership rules beginning no later than 1998.[322]

The Supreme Court has not expressly reevaluated the endurance of the scarcity rationale, determining instead that recent First Amendment cases involving the electronic media have not fallen within the parameters of Red Lion.[323] Numerous jurists, however, have openly challenged the validity of the doctrine. For example, Judge Bork observed more than a decade ago in Telecommunications Research and Action Center v. FCC,[324] that there is "nothing uniquely scarce about the broadcast spectrum" and that the "scarcity concept . . . inevitably leads to strained reasoning and artificial results."[325]

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[321] Communications Act of 1995, H.R. Rep. No. 104-204, 104th Cong. 1st Sess. at 54 (July 24, 1995).

[322] Id.

[323] See, e.g., Turner I, 512 U.S. at 638.

[324] 801 F.2d 501 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987).

[325] Id. at 508; see also Time Warner Entertainment Co. v. FCC, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc) ("[T]he criticism [of Red Lion] rests on the growing number of available broadcast channels."); Action for Children's Television v. FCC, 58 F.3d 654, 684 (D.C. Cir. 1995), cert. denied 516 U.S. 1043 (1996) (Wald, J., dissenting) ("[T]echnological assumptions about the uniqueness of broadcast[ing] . . . have changed significantly in recent years.").

More recently, Chief Judge Edwards recognized that "it is no longer responsible for courts to apply a reduced level of First Amendment protection for regulations imposed on broadcast based on an indefensible notion of spectrum scarcity."[326] Significantly, although the Chief Judge's dissent presented a detailed analysis of the obsolescence of the Red Lion standard, the majority opinion upholding the FCC's time-of-day restrictions on the broadcast of indecent material did not invoke, much less rely on, notions of scarcity. Instead, the majority focused on television's "uniquely pervasive presence" and the assertion that "broadcasting is uniquely accessible to children."[327] Equally important, the majority based its decision on what it deemed convincing evidence of a compelling government interest in protecting children from exposure to indecent programming, and found the "channeling" mechanism adopted by the FCC to be no more restrictive than necessary.

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[326] Action for Children's Television, 58 F.3d at 674. The Chief Judge also wrote, "[N]either technological nor economic scarcity distinguish broadcast from other media." Id. at 676; see also HBO, 567 F.2d at 45 (quoting Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247-56 (1974)) ("scarcity which is the result . . . of economic conditions is . . . insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press").

[327] Action for Children's Television, 58 F.3d at 659 (citation omitted). The "uniquely pervasive presence"/"uniquely accessible to children" rationale does not provide a justification for upholding the newspaper/broadcast cross-ownership rule. That rationale has only been used to uphold content-based regulations, as exemplified by Action for Children's Television; by contrast, the newspaper/broadcast cross-ownership rule is a structural content-neutral regulation. See FCC v. NCCB, 436 U.S. at 801; see also Commissioner Michael K. Powell, Remarks before The Media Institute (April 22, 1998) ("[T]he pervasiveness of broadcasting certainly has rivals in cable, satellite services and . . . Internet services . . . . The TV set . . . is no more an intruder into the home than cable [or] DBS . . . ."). Moreover, the government's stated interest in the newspaper/broadcast cross-ownership rule does not include a desire to protect children. See also Affidavit of J. Gregory Sidak, filed concurrently in the instant proceeding on behalf of the NAA (July 21, 1998).

The Commission, of course, need not take it upon itself to overrule the Supreme Court's decision in Red Lion in order to determine that its factual predicate -- the scarcity of channels -- cannot today justify the newspaper/broadcast cross-ownership ban. The agency must, however, recognize the implications of the extraordinary changes that have occurred in the information marketplace since Red Lion and NCCB. In view of those changes, the scarcity rationale should not be seen as an obstacle to reexamination of the newspaper/broadcast cross-ownership rule, nor as an impediment to repealing the rule.[328]

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[328] Furthermore, to the extent that the viability of other theories for the regulation of broadcasting depend upon the factual validity of the spectrum scarcity rationale, these other theories should not be seen as an obstacle to the reexamination of the newspaper/broadcast cross-ownership rule. For example, the "limited public forum" rationale, which asserts that the broadcast spectrum is a government-owned public forum that the government has the right to regulate in order to advance the interests of the public, appears to have its genesis in the scarcity rationale. See Winer, Public Interest Obligations supra n.30, at 6 ("[T]he very concept of spectrum ownership . . . is meaningless and cannot be itself justify anything. . . . [P]ublic ownership here is simply a way of stating the pre-determined conclusion in favor of government regulation, a conclusion that needs other independent support."); Matthew L. Spitzer, The Constitutionality of Licensing Broadcasters, 64 N.Y.U. L. Rev. 990, 1029 (1989) ("Even assuming that the government can and does 'own the spectrum,' the government-property argument cannot automatically justify reduced first amendment protection for broadcasting in the context of a governmental regulatory scheme."). In any event, the Supreme Court recently dealt a potentially devastating blow to the viability of the public forum rationale as a justification for a diminished level of constitutional scrutiny in the broadcast context. In Arkansas Educational Television Comm'n v. Forbes, 118 S. Ct. 1633 (1998), the Court concluded that a public television station was not public forum, even when the station hosted a televised debate for political candidates. See id. at 1639 ("Claims of access under our public forum precedents could obstruct the legitimate purposes of television broadcasters.").

## C. The Commission's Newspaper/Broadcast Cross-Ownership Rule Disproportionately Burdens Newspapers and Therefore Should Be Subject to Strict Scrutiny, Under Which It Would Surely Fail.

### 1. The Cross-Ownership Rule Singles Out Newspaper Publishers for Disparate Treatment.

Moreover, NAA submits, because the newspaper/broadcast cross-ownership ban has a disparate impact on newspaper publishers in the current regulatory environment, it should be subjected to strict scrutiny under the First Amendment.[329] The Supreme Court in Arkansas Writer's Project described the burden that the government faces in such cases as "heavy", and stated that the government "must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."[330] The newspaper/broadcast cross-ownership ban, if it were examined under this standard, would fail on both counts.

The Supreme Court has long viewed government attempts to single out certain sectors of the media for regulation with suspicion. The Court first considered this subject in Grosjean v. American Press Co., in which it struck down a tax which was imposed selectively on a small group of newspaper publishers: "[T]he suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."[331] Moreover, the actual government motivation behind such discriminatory regulation is irrelevant; no intent to suppress speech on the part of the government need be shown. On the contrary, the very

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[329] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); Minneapolis Star v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Grosjean v. American Press Co., 297 U.S. 233 (1936).

[330] 481 U.S. at 231.

[331] Grosjean, 297 U.S. at 250.

existence of "differential treatment", the Court said in Minneapolis Star, "suggests that the goal of the regulation is not unrelated to the suppression of expression, and such a goal is presumptively unconstitutional."[332]

Twenty years ago, when it considered the constitutionality of the newspaper cross-ownership regulation, the Supreme Court concluded that "the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications were already treated under the Commission's multiple ownership rules."[333] At that time, as discussed above, the FCC was in the process of imposing a series of cross-ownership regulations across all sectors of the then-existing mass media. The Court relied on this fact to distinguish the newspaper cross-ownership ban from the tax struck down in Grosjean, saying: ". . . owners of radio stations, television stations, and newspapers alike are now restricted in their ability to acquire licenses for co-located broadcast stations . . . [Grosjean] is thus distinguishable in the degree to which newspapers were singled out for special treatment."[334] Thus, the Court was unquestionably influenced by the fact that the FCC had "over the years . . . impos[ed] increasingly stringent restrictions on multiple ownership of broadcast stations."[335]

However, the FCC's application of ownership restrictions has changed dramatically in the intervening years. As shown above in Section VII, deregulation initiated by both the FCC

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[332] Minneapolis Star, 460 U.S. at 585.

[333] FCC v. NCCB, 436 U.S. at 801.

[334] Id.

[335] Id. at 780.

and Congress has eliminated or dramatically eased the broadcast ownership restrictions referred to by the Supreme Court in FCC v. NCCB. The newspaper cross-ownership ban is thus a last remnant of a regulatory scheme that has otherwise been dismantled. Standing on its own, the ban results in disparate treatment of newspaper owners, now the only segment of the media presumptively forbidden from buying even a single broadcast outlet in their home towns. This kind of disparate treatment is exactly what the Court has condemned in Grosjean and its progeny.

The newspaper cross-ownership ban clearly could not withstand strict scrutiny. The FCC can show no compelling government interest to justify the ban, especially in the wake of extensive deregulation in other areas; it is implausible to argue that the government's interest in maintaining diversity in the newspaper/broadcast arena is "compelling", but that this interest does not reach other, similar activities by competing media owners.[336] Furthermore, even if it has a compelling interest in maintaining diversity, the government cannot show that the cross-ownership ban is either "necessary" or narrowly tailored to achieve that goal. Like the tax in Arkansas Writers' Project, it is "both overinclusive and underinclusive."[337] It prohibits all newspaper/broadcast combinations, whether or not they can be shown to decrease diversity, and it fails to reach other combinations which may, under the FCC's outdated rationale, have just as much of an effect on diversity. Thus, maintenance of the newspaper/broadcast rule effectively limits publishers' ability to express their views through another media outlet and

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[336] See supra sec. VII.

[337] Arkansas Writers' Project, 481 U.S. at 232.

places newspapers at a distinct and constitutionally impermissible disadvantage in the information marketplace.

### 2. The Relative Effectiveness or Influence of Newspapers or Broadcast Stations Is Not a Permissible Basis for Discriminatory Regulatory Restrictions.

The suggestion that daily newspapers and broadcast stations are different from other modes of communication -- because the public uniquely relies on them for local news and public opinion -- cannot justify maintenance of the cross-ownership ban. "Ordinarily, relative influence or effectiveness of expression is not an apt consideration in determining freedom of speech."[338] Indeed, "any argument that uses the effectiveness of a medium of communication as a basis to justify government regulation of the medium stands the First Amendment on its head."[339] Further, "[t]he concept that the government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."[340]

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[338] Donald E. Lively, Modern Media and the First Amendment, 67 Wash. L. Rev. 599, 600 (1992) (citing First National Bank v. Bellotti, 435 U.S. 765, 790-92 (1978); Telecommunications Research & Action Ctr., 801 F.2d at 508.

[339] Winer, Public Interest Obligations supra n.30, at 6; see also Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (citations omitted) ("[T]he concept that the government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."); Donald E. Lively, Modern Media and the First Amendment, 67 Wash. L. Rev. 599, 600 (1992) (citations omitted) ("Ordinarily, relative influence or effectiveness of expression is not an apt consideration in determining freedom of speech.").

[340] Buckley, 424 U.S. at 48-49 (citations omitted).

It is not the effectiveness or relative "strength" of the speakers that is the key to a determination that adequate diversity exists. Rather, it is the mere availability of a sufficient number of voices or outlets in a market.[341] Accordingly, the fact that daily newspapers and broadcast television may be seen as more effective in certain respects than other modes of communication is not a constitutionally permissible justification for applying a lower level of judicial scrutiny to regulations of these modes of communication, and cannot be invoked to sustain the newspaper/broadcast cross-ownership rule.

In any event, as shown above, daily newspapers and broadcast stations compete vigorously with each other and their many rivals in the local mass media marketplace. Newspapers take broadcast stations to task on their errors, omissions, and editorial points of view, and broadcast stations challenge local newspapers in the same manner. As a result, the marketplace provides an inherent check on these media, rendering it irrelevant which modes of communications the public more often relies upon as a source for news and public opinion. This dynamic is no different in a local market where a daily newspaper and broadcast station are under common ownership. Diversity of programming or viewpoints among the mass media in local markets is not a result of separate ownership, but rather of market economics, business realities and professional standards, and competition for the local audience.

Moreover, no matter how influential a daily newspaper may be, the newspaper publisher lacks the power to influence public opinion by precluding similar modes of

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[341] See supra sec. VII.

communication.[342] Whereas a cable operator has gatekeeper power to select which signals to carry on its system, a "daily newspaper . . . does not possess the [similar] power to obstruct readers' access to . . . weekly local newspapers, or daily newspapers published in other cities."[343] Similarly, with respect to broadcasting, the technological advances in the information marketplace combined with broadcasting's steadily declining share of the market indicate that broadcasting no longer holds the unique power and dominance that it once did. New media, including cable television and the Internet, have increasingly challenged the once-dominant place of broadcasting in American society.[344] Studies have shown that 61 percent of all Internet users watch less television in order to spend more time online.[345] Thus, the notion of broadcasting's unique power and importance in the local mass media market no longer makes sense in an era where broadcast television is not "the dominant player in the video

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[342] "[A]lthough a daily newspaper and a cable operator both may enjoy monopoly status in a given locale, the cable operator exercises far greater control over access to the relevant medium." Turner I, 512 U.S. at 656.

[343] Id.

[344] Congress has indicated that it does not "regard [locally-oriented] broadcast programming as more valuable than [locally-oriented] cable programming." Id. at 648. "'Congress' solicitousness for local broadcasters' material simply rests on its assumption that they have [only] as much to say of interest or value as the cable programmers who service a given geographic market audience.'" Id. (quoting Turner Broadcasting Sys. Inc. v. FCC, 819 F. Supp. 32, 44 (D.D.C. 1993)).

[345] Werbach, Digital Tornado: the Internet and Telecommunications Policy at 43 (1997) (citing The Internet May Be Cutting Into TV's Audience, N.Y. Times News Service, Jan. 31, 1997).

marketplace,"[346] and cannot justify a rule that singles out newspaper publishers and station owners for exclusion from that marketplace.[347]

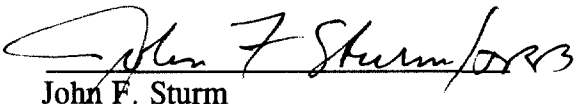
[346] James J. Popham, Passion, Politics and the Public Interest: The Perilous Path to a Quantitative Standard in the Regulation of Children's Television Programming, 5 CommLaw Conspectus 1, 25 (1997); see also Diane Mermigas, Behind the Numbers Ratings Special Report: Ratings not Equal to Profit Anymore, Electronic Media, Mar. 2, 1998, at 15 ("[T]he laws of supply and demand that have worked to the networks' favor in the past could work against them in a TV marketplace diffused by hundreds of program choices." The marketplace is "rapidly splintering" and the "networks' audience shares [are] declin[ing].").

[347] Finally, the recent D.C. Circuit ruling in Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998), indicates that cross-ownership restrictions cannot be justified by unproven assumptions concerning the desirability of diverse ownership as a "proxy" for content or viewpoint diversity. In that case, the Court of Appeals observed that "[t]he Commission . . . stated that its EEO regulations rest solely on its desire to foster 'diverse' programming content," but "[t]he Commission never define[d] exactly what it mean[t] by 'diverse programming.'" Id. at 354. The Court found this amorphous diversification rationale to be inadequate to uphold the EEO regulations. Id. at 355, 356; see also id. at 356 ("[O]ur opinion has undermined the proposition that there is any link between broad . . . regulation and the Commission's avowed interest in broadcast diversity.") Given this recent ruling, it seems highly unlikely that a court would uphold the disparate treatment of publishers under the newspaper/broadcast cross-ownership rule based on unproven FCC assumptions regarding the desirability of diverse ownership.

## X. CONCLUSION

The newspaper/broadcast cross-ownership rule is no longer necessary in the public interest. The dramatic changes that have occurred in the mass media marketplace since the rule was adopted twenty-three years ago make it impossible for the FCC to justify maintaining this over-regulatory and counterproductive restriction on combined ownership, especially in light of the serious First Amendment burdens the rule places on both broadcasters and newspaper publishers. Accordingly, NAA requests that the Commission promptly initiate a rulemaking proceeding to repeal the newspaper/broadcast cross-ownership rule in its entirety.

Respectfully submitted,



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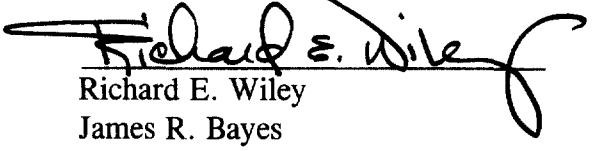

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July 21, 1998

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# APPENDIX A

Statement of E. Molly Leahy,
Legislative Counsel,
Newspaper Association of America

# STATEMENT OF E. MOLLY LEAHY

1. I am Legislative Counsel for the Newspaper Association of America ("NAA"). The NAA is a non-profit organization that represents the newspaper industry and over 1,700 newspapers in the United States and Canada.

2. NAA members account for approximately 87 percent of the daily circulation of newspapers in the United States. Many NAA members also hold broadcast licenses in the home markets of their newspapers which were issued prior to the adoption of the Federal Communications Commission's newspaper/broadcast cross-ownership ban, and thus are "grandfathered" under the rule.

3. In June-July 1998, the NAA conducted an informal and confidential survey of the grandfathered cross-owners among its members. These newspaper/station owners were asked to comment on four general areas: first, the amount of local news and public affairs programming and publishing that the respondents' outlets do in relation to their competition; second, the degree to which resources and facilities are shared among the respondents' newspaper and broadcast outlets, if at all; third, whether there is a substantial difference in editorial posture between the respondents' broadcast and newspaper properties; and, finally, the amount and type of competition that the broadcasters and publishers face for advertising dollars in their local markets, and the extent to which other, alternative news sources (e.g. the Internet) provide services to the respondents' customers.

4. The responses to our inquiries were generally consistent and, moreover, consistent with my understanding and expectations based on my own involvement with the newspaper industry. Most of the cross-owned broadcast properties that replied provide at least

as much, and in many cases much more, local news than their competitors. Few reported significant sharing of resources between the broadcast and print properties -- the sharing that was present typically was confined to the provision of new and specialized services that would not have been feasible otherwise. Each cross-owned property maintained a strict separation in editorial control among the outlets, and each reported a growing level of competition both from other, traditional media, and from new, alternative media.

5. The cross-owners who replied to our inquiry disclosed that they maintain separate editorial control at their broadcast and print properties, although some take advantage of opportunities to provide new services to consumers through collaboration. Most described the relationship between the television or radio stations and the newspapers as being "competitive" or "very competitive."

6. In addition to such traditional competitors as the yellow pages, outdoor advertising, direct mail, other newspapers, and television and radio stations, the respondents indicated that they are being challenged by direct broadcast satellite services, cable television, wireless cable, videocassette sales and rentals, the Internet, and specialty newspapers (such as alternative weeklies). Most of the respondents stated that more than 10% of their audience now has access to the Internet. For example, in Cedar Rapids, Iowa, an estimated 58% of the adult population is online. These media have either been invented or only become viable and popular in the years after the cross-ownership ban was imposed two and a half decades ago. The responses also confirmed that number of voices available to the consumer in all of these markets is increasing dramatically, as is the competition for advertising revenue.

7. The following is a sample of some of the responses received:

- Paxton Media Group, owner of the Paducah Sun, and television station WPSD-TV in Paducah, Kentucky, stated that the relationship between the television station and newspaper is "competitive to the hilt;" that the television station has, on several occasions, questioned the accuracy of the newspaper; that the newspaper has criticized the television station for its involvement in televising the execution of a search warrant which resulted in no criminal charges being filed. Paxton's response further indicated that while WPSD-TV does not presently editorialize, it has, in the past, taken contrary editorial positions with the Paducah Sun, including divergent views on the creation of a Kentucky State Lottery. The company also reported that the television station and newspaper have collaborated on the development of an Internet World Wide Web site which includes searchable archives for over a month's worth of local news and affairs stories, and that this combined effort makes for "a content rich site in a relatively small market."

- Schurz Communications, owner of the South Bend Tribune, television station WSBT-TV, and radio stations WSBT-AM and WNSN-FM in South Bend, Indiana, stated that its AM station provides "much more news than competing stations;" that its television station is the only one in South Bend to offer a weekly local public affairs program; that the television station and newspaper have been able to sponsor joint polls and hire freelance journalists on election night but that, once commissioned, the polls were interpreted separately by the individual news staffs at the newspaper and television station.

- Quincy Newspapers Group, owner of the Quincy Herald-Whig, television station WGEM-TV, and radio stations WGEM-FM and WGEM-AM in Quincy, Illinois, stated that its AM station offers "more [news] than most area radio stations," and that its FM station offers "more [news] than most area FM stations." The company also noted that there are several dozen Internet Service Providers in Quincy, and all area television and radio stations offer Internet sites with informational content.

- The Gazette Co., owner of The Gazette, television station KCRG-TV, and radio station KCRG-AM in Cedar Rapids, Iowa, stated that KCRG-TV offers 27 hours per week of local news, compared to the 21.5 and 14.5 hours per week offered by its competitors. The company also has been able to hire an "ombudsman" to "provide a continuing review of the accuracy and fairness of the news" reported by both its television and newspaper properties; the ombudsman, a journalism professor at the University of Iowa, has "free rein to critique and evaluate" both newspaper and broadcast stories, and has taken both the newspaper and the broadcast station to task on several occasions. The company reported that there are 76 separate weekly newspapers published in its DMA, 11 cable systems, and

a wide variety of free niche publications on subjects ranging from parenting to auto ownership, each of which competes with the company's outlets for advertising.

- The Daily News Broadcasting Co., owner of the Daily News, and radio stations WDNS-FM and WKCT-AM in Bowling Green, Kentucky, stated that its AM station is the only radio station in the market to employ a full time news director.

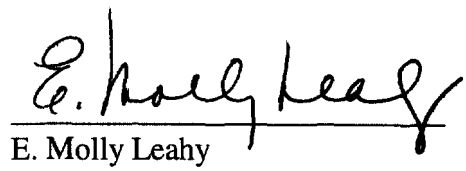
- Findlay Publishing, owner of The Courier, and radio stations WFIN-AM and WKXA-FM in Findlay, Ohio, stated that WFIN is the only radio station in the Findlay market to offer a full time news/talk format.

- Forum Communications, owner of the Forum, television station WDAY-TV, and radio station WDAY-AM in Fargo, North Dakota, along with WDAZ-TV in Grand Forks, North Dakota, stated that it has developed an Internet World Wide Web site for its media outlets. This web site contains visual material from the newspaper, as well as Real Audio clips from the radio and television stations. The company also identified 30 weekly newspapers and 7 daily newspapers as competitors, and noted that there are 75 cable systems within its market area in North Dakota.

- The Post Company, owner of the Idaho Falls Post-Register and television station KIFI-TV in Idaho Falls, Idaho, stated that its television station and newspaper have developed a joint Internet World Wide Web site, that this site provides stories sourced from both the television station and the newspaper, and that the site provides a hosting service for small community groups, such as the Idaho Falls Art Council.

8. In summary, the survey responses confirmed that cross-owned paper and broadcast outlets typically do not merge their operations or even share substantial journalistic resources; when they do, they typically produce output that otherwise would have been unavailable, rather than merely re-using pre-existing material. All of the cross-owned outlets indicated that they maintain editorial separation and take their status as independent organizations quite seriously. Nonetheless, the increasing competition from traditional and alternative media is making economies of scale more and more important in some markets. The publisher of the Idaho Post Register, in fact, noted that his business was coming under

more and more competitive pressure and, that in his opinion, joint ownership "is anything but anti-competitive. Joint ownership could be the only thing keeping the last independent television station in the northern Rockies independent."



E. Molly Leahy
Legislative Counsel
Newspaper Association of America

July 21, 1998

# APPENDIX B

Economists Incorporated

Structural and Behavioral Analysis of the
Newspaper-Broadcast Cross-Ownership Rules

July, 1998